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15 *Attorneys for Defendants*

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 OAKLAND DIVISION

19 REARDEN LLC and REARDEN MOVA  
20 LLC,

21 Plaintiffs,

22 vs.

23 WALT DISNEY PICTURES, a California  
corporation,

24 Defendant.

Case No. 4:17-cv-04006-JST-SK

**DEFENDANT'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
RECONSIDERATION OF ORDER  
GRANTING DEFENDANT'S MOTION  
TO EXCLUDE TESTIMONY OF CINDY  
IEVERS AND ORDER GRANTING IN  
PART AND DENYING IN PART  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Filed Concurrently: Declaration of John L.  
Schwab

Judge: Hon. Jon S. Tigar  
Ctrm.: 6 (2nd Floor)

1                   **OPPOSITION TO PLAINTIFFS’ MOTION FOR RECONSIDERATION**

2           **I.       INTRODUCTION**

3           Rearden’s motion for reconsideration (“Motion”) of the Court’s Order excluding the  
4 testimony of Cindy Ievers, ECF 553, (“Order”), should be denied for two independent reasons.<sup>1</sup>

5           *First*, the Motion fails to establish a “manifest failure by the Court to consider material  
6 facts or dispositive legal arguments which were presented to the Court before” it entered the  
7 Order. Civil L.R. 7-9(b)(3). The Motion cites more than a dozen cases, none of which Plaintiffs  
8 cited in their opposition to Defendant’s motion to exclude. The Motion does not even cite any  
9 case included in Rearden’s opposition—by definition the legal authority that the Court purportedly  
10 manifestly failed to consider—much less explain how any of the authorities Plaintiffs “presented  
11 to the Court” were “dispositive” of any of the legal grounds on which the Court correctly excluded  
12 Ms. Ievers’s opinions. The only ““material fact”” the Motion points to is an out-of-context  
13 quotation from the Order, Mot. 7, and that quotation is not “material.” The Motion therefore fails  
14 to meet the standard for reconsideration.

15           *Second*, far from being “dispositive,” Rearden’s arguments are based on an incorrect  
16 statement of the standard for actual damages in copyright cases. Although Rearden wastes much  
17 ink arguing that actual damages may be calculated as lost profits rather than a hypothetical license  
18 fee, that is not why the Court excluded Ms. Ievers’s opinions as legally infirm. Rather, the Court  
19 held that Ms. Ievers’s entire analysis was predicated on her views of what Rearden could *charge*  
20 for MOVA services *a as a whole* and not on what a willing buyer would pay a willing seller for  
21 the claimed infringing act (i.e. for the copying of MOVA software). Those two analytical failures  
22 each independently require exclusion of Ms. Ievers’s opinions under controlling law. None of  
23 Rearden’s dozen new cases even suggests otherwise, much less “compels a different outcome.” *In*

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26 <sup>1</sup> Because Ms. Ievers’s opinion testimony was properly excluded, the Court also should deny  
27 Rearden’s motion to reconsider summary judgment on actual damages, ECF 555. Rearden does  
28 not raise any basis for reconsidering that ruling other than its request that the Court reconsider the  
exclusion of Ms. Ievers.

1 *re Plantronics, Inc. Sec. Litig.*, No. 19-CV-07481-JST, 2022 WL 17974627, at \*4 (N.D. Cal. Nov.  
2 7, 2022) (Tigar, J.).

3 The Court correctly excluded Ms. Ievers opinions and, therefore, correctly granted  
4 summary judgment on actual damages. The Motion should be denied.

## 5 **II. ARGUMENT**

### 6 **A. The Motion Fails To Identify Dispositive Legal Arguments Or Material Facts 7 That Were Presented to the Court.**

8 “Plaintiffs’ burden on this motion is to demonstrate a manifest failure by this Court to  
9 consider ‘dispositive legal arguments *which were presented to the Court* before’” it issued its  
10 Order excluding Ms. Ievers. *Campbell v. City of Milpitas*, No. 13-CV-03817-BLF, 2015 WL  
11 3396809, at \*3 (N.D. Cal. May 22, 2015) (quoting Civil L.R. 7-9(b)(3)). To meet that burden,  
12 Plaintiffs must at a bare minimum “identify any cases that *they cited* to the Court in briefing” that  
13 they now contend are dispositive of the issues. *Id.*

14 Rearden does not point to *any* case it previously identified, much less any case that it  
15 contends is dispositive. Rearden’s opposition to Defendant’s motion to exclude Ms. Ievers’s  
16 opinions cited 16 cases. The Motion does not rely on *any* of those 16 cases. Rearden instead cites  
17 a dozen different cases that it did *not* cite before and claims those cases are controlling. The cases  
18 are not even remotely on point, *infra* § II.B, but they also were not previously presented to this  
19 Court and, therefore, do not provide a basis for reconsideration under Local Rule 7-9(b)(3).<sup>2</sup>

20 Rearden similarly fails to point to any *material* fact that the Court did not consider.  
21 Rearden argues that the Court made a material error of fact in writing that in addition to the  
22 “‘\$3.49 million’ [that Ms. Ievers] estimated in lost profits...” because Ms. Ievers opined that the  
23 \$3.49 million was the total amount Rearden would have charged, with 20% of that as the “profit.”  
24 Mot. 7–8. Rearden claims that “the Court’s opinion treated the \$3.49 million as Rearden’s lost  
25 profits claim” and then used that number to “conclud[e] that her model was speculative.” *Id.* at 8.

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26 <sup>2</sup> Plaintiffs do not argue that any of their new cases constitute a material change in law, L.R. 7-  
27 9(b)(1)-(2), not could they since the cases were all decided well prior to the filing of Rearden’s  
28 opposition to the motion to exclude Ms. Ievers’s opinions.

Rearden has simply mischaracterized the Order. The Order correctly explains that Ms. Ievers “first estimates the costs that Rearden would have incurred to provide the MOVA services to Disney,” and “then adds a 20% markup.” Order 3–4. More important, the Court concluded that Ms. Ievers had failed to opine on the fair market value of the alleged infringing act, not that her model was speculative. Order 5. As Rearden conceded in its opposition to Defendant’s motion, Ms. Ievers opined only as to “the amount that Rearden would have charged Disney for its services for the MOVA enterprise.” *Id.* The Court correctly excluded that opinion because it “would ‘t[ell] the jury little of what’ profits Rearden lost based on DD3’s ‘specific use of [Rearden’s] copyrights.’” *Id.* (quoting *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1091 (9th Cir. 2014)).

Because Rearden has pointed to no dispositive law and no material facts that it previously presented to the Court, the Motion fails out of the gate and must be denied.

**B. Rearden’s Argument Is Contrary To Law And In No Way “Dispositive.”**

The Motion fails to point to any “dispositive” legal argument that requires a different outcome here. It almost wholly ignores the controlling Ninth Circuit precedent on these issues, in favor of arguments about policy considerations and citations to patent cases and unpublished district court opinions. None of Rearden’s arguments even remotely approach a “dispositive” legal argument; all of them are instead contrary to settled law.

**1. Ms. Ievers Did Not Consider What A Willing Buyer Would Pay A Willing Seller**

It is black letter law that actual damages are measured by “the extent to which the market value of a copyrighted work has been injured or destroyed by an infringement.” *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 (9th Cir. 1985). As the Ninth Circuit has explained repeatedly, in determining loss of market value we do not ask what the owner would like to have charged if unconstrained by reality, but what a willing owner actually would have charged after negotiation with the buyer. That is, fair market value is based on “‘an objective, not a subjective, analysis.’” *Jarvis v. K2 Inc.*, 486 F.3d 526, 534 (9th Cir. 2007) (quoting *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002)).

Ms. Ievers did not consider what a willing buyer would have agreed to pay. As she testified, “I was asked to – to calculate how much Rearden would have *charged* and how much profit Rearden would have made, and I did that.” Declaration of John L. Schwab (Schwab Decl.) Ex. A (Ievers 6/20/23 Dep.) at 43:9-12 (emphasis added). She made no attempt to evaluate objectively what Defendant would have agreed to pay “after negotiation”, *Oracle*, 765 F.3d at 1088, because in her view, Defendant “stole” the MOVA technology and “if you steal something, the value is effectively list price.” Schwab Decl. Ex. A at 124:24–125:15; see also *id.* at 158:1-22 (“[W]e had no negotiation with Disney. We had no agreement with Disney.”) Therefore, she considered only “what we would have *charged* for the work done for that time.” *Id.* (emphasis added); see also *id.* at 69:14-21 (in response to question about whether she was opining “that Disney would have paid” a certain amount, noting “[a]ctually, my opinion is that . . . that’s how much Rearden *would have charged*.”) (emphasis added). The Ninth Circuit has rejected exactly that reasoning, because the “emphasis on post-infringement damages rather than the pre-infringement fair market value” is “legally defective.” *Jarvis*, 486 F.3d at 534 n.9 (district court properly disregarded plaintiff’s expert testimony that focused on what defendant “should have paid [plaintiffs] *after* its infringement”).

Rearden tries to excuse Ms. Ievers’s failure to offer an opinion consistent with controlling law on three different grounds. Each one is meritless.

First, Rearden argues that actual damages need not be measured by the fair market value of the infringement. It spends much time trying to distinguish *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 710 (9th Cir. 2004) from the facts here, Mot. 2, but Rearden misses the point. *Polar Bear* merely reiterates the well-established rule that “[t]he Ninth Circuit test for market value is ‘what a willing buyer would have been reasonably required to pay to a willing seller for plaintiffs’ work.’” *United States v. King Features Ent., Inc.*, 843 F.2d 394, 400 (9th Cir. 1988) (quoting *Frank Music Corp.*, 772 F.2d at 512); see also *Mackie*, 296 F.3d at 917 (same); *Jarvis*, 486 F.3d at 533–34 (same); *Oracle*, 765 F.3d at 1087 (same); *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 786 (9th Cir. 2006) (same). Ms. Ievers *admitted* she did not adhere to this

1 standard, *see, e.g.*, Schwab Decl. Ex. A at 124:24–125:15, 158:1-22, and her opinions were  
2 properly excluded for that reason.

3 Rearden cites two unpublished decisions, neither of which is on point, much less  
4 “dispositive” of the issue. Rearden claims that *Evenflow Plumbing Co. v. Pacific Bell Directory*  
5 supports its position, but that case actually held that the plaintiff could not establish actual  
6 damages because it had not introduced evidence of its lost profits. No. C-3:04CV00795 EDL,  
7 2005 WL 1353822, at \*2 (N.D. Cal. June 7, 2005). Rearden’s reliance on *WMTI Productions, Inc.*  
8 *v. Healey* is similarly misplaced. No. CV 20-02726-CJC (MAAx), 2023 WL 5506712, at \*4 (C.D.  
9 Cal. July 13, 2023). That case denied summary judgment because the Court disagreed with  
10 defendants’ argument that the “claimed actual damages ... do not even *purport* to be ‘as a result of  
11 the infringement.’” *Id.* (quoting 17 U.S.C. § 504(b)). The case did not address the issue raised by  
12 Defendant’s motion, namely, whether actual damages must represent the amount a willing buyer  
13 would pay a willing seller. That is the controlling standard, as the Ninth Circuit has said many  
14 times.

15 Second, Rearden spends many pages arguing that Ms. Ievers’s opinions should be  
16 permitted because it would “accord[] with the policies underlying copyright damages.” Mot. 3-5.  
17 Rearden thus tacitly admits that it has no *law* on its side. To the extent any policy considerations  
18 are relevant, the Ninth Circuit has presumably weighed those considerations in repeatedly holding  
19 that actual damages must be based on an objective transaction between a willing buyer and willing  
20 seller. Rearden’s discussion of hundred-year-old patent cases and dicta from out-of-circuit cases,  
21 *id.* at 3, does not change the fact that the law on copyright actual damages is well-settled in the  
22 Ninth Circuit. And Rearden falls far short of establishing a “dispositive” legal argument that  
23 requires a different outcome here.

24 Third, Rearden argues that the willing buyer/willing seller requirement is met by “Ms.  
25 Ievers’s use of the Rearden and DD3 standard rate cards that both firms actually used in the  
26 market to charge willing studio buyers for MOVA services.” Mot. 5–6. That is wrong. As  
27 Defendant explained in its original motion, Ms. Ievers’s opinions are based on a 2016 DD3 rate  
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1 card that was created by Greg LaSalle. ECF 424 at 5–7. There is *no evidence* that the rate card  
 2 was ever actually used to charge any studio for work on any film. *Id.* And Mr. LaSalle testified  
 3 that the rate card was intended “for customers that did not engage Digital Domain to do the visual  
 4 effects ... Meaning they just hired MOVA almost as a subcontractor that did not involve any other  
 5 Digital Domain work.” Schwab Decl. Ex. B (LaSalle 6/16/20 Dep.) at 34:9-14. Ms. Ievers did not  
 6 review Mr. LaSalle’s testimony and admitted she had no idea if the rate card had ever been used to  
 7 charge a customer. *Id.* Ex. A at 56:6-11, 56:20-22, 58:11-14.

8 More importantly, the problems with Ms. Ievers’s opinions go beyond her mere use of that  
 9 rate card. As Defendant has explained in detail, Ms. Ievers made numerous assumptions about the  
 10 services Rearden would have charged for and the amounts it would have charged without ever  
 11 considering if a reasonable buyer would have agreed to those terms. ECF 424 at 5–7. Indeed, she  
 12 did not even *consider* the actual costs DD3 incurred to provide MOVA services when coming up  
 13 with her own list of services Rearden would have charged for. That is how Ms. Ievers was able to  
 14 opine that Rearden’s “cost” to provide MOVA services on *Beauty and the Beast* would have been  
 15 nearly \$3 million dollars when DD3’s actual costs for those services were less than \$300,000. *Id.*  
 16 at 11. To take just one example, roughly 20% of Ms. Ievers’s total damages are based on her  
 17 assumption of what Rearden would have charged Defendant to leave the MOVA rig on-site in the  
 18 United Kingdom and unused for *80 days*. *Id.* at 6. Her estimated damages for that number alone  
 19 is orders of magnitude higher than the only instance she could recall in which Rearden had  
 20 charged for the rig to sit unused on the set. *Id.* In that instance, Ms. Ievers conceded, the client  
 21 negotiated for that far lower fee, *id.*, while here she simply assumed that there could be no  
 22 negotiation.<sup>3</sup> That assumption permeates all of her opinions and it is flatly contrary to controlling  
 23 Ninth Circuit law. The Court correctly excluded her opinion for that reason.

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 26 <sup>3</sup> Even under Ms. Ievers’s estimates, Defendant could have paid for the rig to be transported back  
 27 and forth three additional times, which would have cost only \$141,300. It would make no  
 28 economic sense for Defendant to have paid the \$600,000 Ms. Ievers estimates to simply leave the  
 rig unused in the United Kingdom.



## 2. Ms. Ievers Did Not Even Attempt To Estimate Damages Attributable To The Alleged Infringement

The Court also correctly excluded Ms. Ievers's opinions because she did not even attempt to measure the market value of the alleged infringement. In its opposition, Plaintiffs conceded that point but argued that it was not possible for Ms. Ievers to measure the market value. The Motion makes the same argument, Mot. 6, but points to no legal authority that the Court overlooked in the Order. In fact, "'whether the infringer might in fact have negotiated with the owner or purchased at the owner's price is irrelevant' to whether hypothetical-license damages are available." *Oracle Corp.*, 765 F.3d at 1088 (quoting *On Davis v. The Gap, Inc.*, 246 F.3d 152, 171-72 (2d Cir.2001).) In other words, the mere fact that Rearden has not licensed MOVA software in the past does not absolve Ms. Ievers of her burden of establishing a hypothetical value for the "specific use of [Rearden's] copyrights"—here, the amount Defendants would have needed to pay for authorization to copy MOVA source code into RAM. *Id.* at 1091.

Rearden again mischaracterizes the Order in arguing that the Court excluded Ms. Ievers's opinions because "she concluded *in her report* that the enterprise value was \$10 million and that sum is part of her damages analysis" but "this was not in her report." Mot. 6. In fact, Ms. Ievers's rebuttal report did argue that "Rearden is not in the business of licensing its technologies to others to use, and it has never done so" and therefore she could only opine on either the value of MOVA services as a whole or "[a]lternatively, Disney could have purchased the MOVA Contour technology, but the price would have been Mova's enterprise value." (6/14/23 Decl. of Ievers) The Order correctly described that portion of her rebuttal report and, more importantly, did so in explaining the *undisputed* fact that Ms. Ievers did not even attempt to measure the value for the "specific use of [Rearden's] copyrights." *Oracle*, 765 F.3d at 1091; *see* Order 5. Because she did not do so, her opinions tells the jury nothing about the proper measure of actual damages in this case and were correctly excluded.

## III. CONCLUSION

Plaintiffs' Motion for reconsideration should be denied.



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3 DATED: November 17, 2023

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4  
5 By: /s/ John L. Schwab  
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